

Appendix C -Property Conveyance/Conservation Easements

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1996 Legislature

CS/HB 2241, Second Engrossed

1 activity regulated under this part cannot be reconciled with
2 mitigation requirements approved under a permit for the same
3 activity issued under this part, the mitigation requirements
4 for surface water and wetland impacts shall be controlled by
5 the permit issued under this part.

6 Section 6. Section 373.4135, Florida Statutes, is
7 amended to read:

8 373.4135. Mitigation banks and offsite regional
9 mitigation banking.--

10 (1) The Legislature finds that the adverse impacts of
11 activities regulated under this part may be offset by the
12 creation, and maintenance, and use of regional-mitigation
13 areas or mitigation banks and offsite regional mitigation.

14 Mitigation banks and offsite regional mitigation can enhance
15 the certainty of minimize mitigation uncertainty and provide
16 ecological value due to the improved likelihood of
17 environmental success associated with their proper
18 construction, maintenance, and management benefits.

19 Therefore, the department and the water management districts
20 are directed to participate in and encourage the establishment
21 of private and public regional-mitigation-areas and mitigation
22 banks and offsite regional mitigation. Mitigation banks and
23 offsite regional mitigation should emphasize the restoration
24 and enhancement of degraded ecosystems and the preservation of
25 uplands and wetlands as intact ecosystems rather than
26 alteration of landscapes to create wetlands. This is best
27 accomplished through restoration of ecological communities
28 that were historically present.

29 (a) The Legislature intends that the provisions for
30 establishing mitigation banks apply equally to both public and
31 private entities, except that the rules of the department and

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1 water management districts may set forth different measures
2 governing financial responsibility, and different measures
3 governing legal interest, needed to ensure the construction
4 and perpetual protection of a mitigation bank.

5 (b) It is the further intent of the Legislature that
6 mitigation banks and offsite regional mitigation be considered
7 appropriate and a permissible mitigation option under the
8 conditions specified by the rules of the department and water
9 management districts.

10 (c) Offsite mitigation, including offsite regional
11 mitigation, may be located outside the regional watershed in
12 which the adverse impacts of an activity regulated under this
13 part are located, if such adverse impacts are offset by the
14 offsite mitigation.

15 (d) The department or water management district may
16 allow the use of a mitigation bank or offsite regional
17 mitigation alone or in combination with other forms of
18 mitigation to offset adverse impacts of activities regulated
19 under this part.

20 (e) When an applicant for a permit under the
21 provisions of this part other than s. 373.4135 and 373.4136
22 submits more than one mitigation proposal to the department or
23 a water management district, the department or water
24 management district shall, in evaluating each proposal, ensure
25 that such proposal adequately offsets the adverse impacts.

26 (2) Local governments shall not deny the use of a
27 mitigation bank or offsite regional mitigation due to its
28 location outside of the jurisdiction of the local government.

29 (3) Nothing in s. 373.4135 or s. 373.4136 shall be
30 construed to eliminate or diminish any of the regulatory
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1 ~~requirements applicable to applicants seeking permits pursuant~~
2 ~~to other provisions of this part.~~

3 (4) Except as otherwise provided herein, nothing in s.
4 373.4135 or s. 373.4136 shall be construed to diminish or
5 limit the existing authority of the department, water
6 management districts, or local governments.

7 (5) Nothing in s. 373.4135 or s. 373.4136 shall be
8 construed to limit the consideration of forms of mitigation
9 other than mitigation banks and offsite regional mitigation.
10 The department and the districts are directed to adopt rules
11 by January 1, 1994, governing the use of mitigation banks.
12 Such rules shall include:

13 (1)--Circumstances in which mitigation banking is
14 appropriate or desirable;

15 (2)--Provisions for the establishment of mitigation
16 banks by governmental, nonprofit, or for-profit private
17 entities with sufficient legal or equitable interest in the
18 property proposed for mitigation banking;

19 (3)--Procedures for the review of mitigation banking
20 proposals in a timely manner pursuant to chapter 129;

21 (4)--A framework for determining the value of a
22 mitigation bank, considering the ecological value of the
23 mitigation bank compared to the area where adverse impacts to
24 wetlands or surface waters are proposed;--Mitigation banks
25 found to be successful prior to withdrawal of credit shall
26 receive greater credit than mitigation which has not yet
27 achieved success;

28 (5)--Procedures for the administration of bank credits
29 so that accounting responsibilities are not unnecessarily
30 duplicated between a water management district and the
31 department;

1 (6)--Requirements to ensure the financial
2 responsibility of nongovernmental entities proposing to
3 develop mitigation banks;

4 (7)--Measures required to ensure the long-term
5 management and protection of mitigation banks;

6 (8)--Criteria for the withdrawal of mitigation credits
7 by projects within or outside the regional watershed where the
8 bank is located;

9 (9)--Criteria governing the contribution of funds or
10 land to an approved mitigation bank;

11 (10)--Criteria allowing the withdrawal of credits by
12 parties other than the party creating the bank; and

13 (11)--Provisions for the consideration of creation,
14 restoration, enhancement, and preservation of wetlands and
15 uplands as part of a mitigation bank;

16 Section 7. ~~Section 373.4136, Florida Statutes, is~~
17 created to read:

18 373.4136 Establishment and operation of mitigation
19 banks.--

20 (1) MITIGATION BANK PERMITS.--The department and the
21 water management districts may require permits to authorize
22 the establishment and use of mitigation banks. A mitigation
23 bank permit shall also constitute authorization to construct,
24 alter, operate, maintain, abandon, or repair any surface water
25 management system necessary to establish and operate the
26 mitigation bank. To obtain a mitigation bank permit, the
27 applicant must provide reasonable assurance that:

28 (a) The proposed mitigation bank will improve
29 ecological conditions of the regional watershed;
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(b) The proposed mitigation bank will provide viable and sustainable ecological and hydrological functions for the proposed mitigation service area;

(c) The proposed mitigation bank will be effectively managed in perpetuity;

(d) The proposed mitigation bank will not destroy areas with high ecological value;

(e) The proposed mitigation bank will achieve mitigation success;

(f) The proposed mitigation bank will be adjacent to lands that will not adversely affect the perpetual viability of the mitigation bank due to unsuitable land uses or conditions;

(g) Any surface water management system to be constructed, altered, operated, maintained, abandoned, or removed within the mitigation bank will meet the requirements of this part and the rules adopted thereunder;

(h) It has sufficient legal or equitable interest in the property to ensure perpetual protection and management of the land within a mitigation bank; and

(i) It can meet the financial responsibility requirements prescribed for mitigation banks.

(2) MITIGATION BANK PHASES.--A mitigation bank may be established and operated in phases if each phase independently meets the requirements for the establishment and operation of a mitigation bank. The number of mitigation credits assigned to a phase of a mitigation bank may be less than would be assigned to that phase upon completion of all phases of the mitigation bank. In such case, the department or water management districts shall increase the number of mitigation credits awarded to subsequent phases of the mitigation bank.

(3) ADDITION OF LANDS.--The department or water management district shall authorize the addition of land to a permitted mitigation bank when it is appropriate to do so and the addition of the land results in an increase in the ecological value of the existing mitigation bank. Any such addition shall be accomplished through a modification to the permit which reflects the corresponding increase in the total number of mitigation credits assigned to the bank.

(4) MITIGATION CREDITS.--After evaluating the information submitted by the applicant for a mitigation bank permit and assessing the proposed mitigation bank pursuant to the criteria in this section, the department or water management district shall award a number of mitigation credits to a proposed mitigation bank or phase of such mitigation bank. An entity establishing and operating a mitigation bank may apply to modify the mitigation bank permit to seek the award of additional mitigation credits if the mitigation bank results in an additional increase in ecological value over the value contemplated at the time of the original permit issuance, or the most recent modification thereto involving the number of credits awarded. The number of credits awarded shall be based on the degree of improvement in ecological value expected to result from the establishment and operation of the mitigation bank as determined using a functional assessment methodology. In determining the degree of improvement in ecological value, each of the following factors, at a minimum, shall be evaluated:

(a) The extent to which target hydrologic regimes can be achieved and maintained.

(b) The extent to which management activities promote natural ecological conditions, such as natural fire patterns.

(c) The proximity of the mitigation bank to areas with regionally significant ecological resources or habitats, such as national or state parks, Outstanding National Resource Waters and associated watersheds, Outstanding Florida Waters and associated watersheds, and lands acquired through governmental or nonprofit land acquisition programs for environmental conservation; and the extent to which the mitigation bank establishes corridors for fish, wildlife or listed species to those resources or habitats.

(d) The quality and quantity of wetland or upland restoration, enhancement, preservation, or creation.

(e) The ecological and hydrological relationship between wetlands and uplands in the mitigation bank.

(f) The extent to which the mitigation bank provides habitat for fish and wildlife, especially habitat for species listed as threatened, endangered, or of special concern, or provides habitats that are unique for that mitigation service area.

(g) The extent to which the lands that are to be preserved are already protected by existing state, local, or federal regulations or land use restrictions.

(h) The extent to which lands to be preserved would be adversely affected if they were not preserved.

(i) Any special designation or classification of the affected waters and lands.

(5) SCHEDULE FOR CREDIT RELEASE.--After awarding mitigation credits to a mitigation bank, the department or the water management district shall set forth a schedule for the release of those credits in the mitigation bank permit. A mitigation credit that has been released may be sold or used

to offset adverse impacts from an activity regulated under this part.

(a) The department or the water management district shall allow a portion of the mitigation credits awarded to a mitigation bank to be released for sale use prior to meeting all of the performance criteria specified in the mitigation bank permit. The department or the water management district shall allow release of all of a mitigation bank's awarded mitigation credits only after the bank meets the mitigation success criteria specified in the permit.

(b) The number of credits and schedule for release shall be determined by the department or water management district based upon the performance criteria for the mitigation bank and the success criteria for each mitigation activity. The release schedule for a specific mitigation bank or phase thereof shall be related to the actions required to implement the bank, such as site protection, site preparation, earthwork, removal of wastes, planting, removal or control of nuisance and exotic species, installation of structures, and annual monitoring and management requirements for success. In determining the specific release schedule for a bank, the department or water management district shall consider, at a minimum, the following factors:

1. Whether the mitigation consists solely of preservation or includes other types of mitigation.
2. The length of time anticipated to be required before a determination of success can be achieved.
3. The ecological value to be gained from each action required to implement the bank.
4. The financial expenditure required for each action to implement the bank.

1 (c) Notwithstanding the provisions of this subsection,
 2 no credit shall be released for freshwater wetland creation
 3 until the success criteria included in the mitigation bank
 4 permit are met.

5 (d) The withdrawal of mitigation credits from a
 6 mitigation bank shall be accomplished as a minor modification
 7 of the mitigation bank permit. A processing fee shall not be
 8 required by the department or water management district for
 9 this minor modification.

10 (6) MITIGATION SERVICE AREA.--The department or water
 11 management district shall establish a mitigation service area
 12 for each mitigation bank permit. The department or water
 13 management district shall notify and consider comments
 14 received on the proposed mitigation service area from each
 15 local government within the proposed mitigation service area
 16 that operates a wetlands regulatory program. Except as
 17 provided herein, mitigation credits may be withdrawn and used
 18 only to offset adverse impacts in the mitigation service area.
 19 The boundaries of the mitigation service area shall depend
 20 upon the geographic area where the mitigation bank could
 21 reasonably be expected to offset adverse impacts. A
 22 mitigation service area may be larger than the regional
 23 watershed if the mitigation bank provides exceptional
 24 ecological value such that adverse impacts outside the
 25 regional watershed could reasonably be expected to be
 26 adequately offset by the mitigation bank. A mitigation
 27 service area may be smaller than a regional watershed if
 28 adverse impacts throughout the regional watershed cannot
 29 reasonably be expected to be offset by the mitigation bank
 30 because of local ecological or hydrological conditions.
 31 Mitigation service areas may overlap, and mitigation service

1 areas for two or more mitigation banks may be approved for a
 2 regional watershed.

3 (a) In determining the extent to which a mitigation
 4 bank provides exceptional ecological value such that adverse
 5 impacts outside the regional watershed could reasonably be
 6 expected to be adequately offset by the mitigation bank, the
 7 department or the water management district shall consider the
 8 characteristics, size, and location of the mitigation bank
 9 and, at a minimum, the extent to which the mitigation bank:

10 1. Will promote a regional integrated ecological
 11 network;

12 2. Will significantly enhance the water quality or
 13 restoration of an offsite receiving waterbody that is
 14 designated as an Outstanding Florida Water, a Wild and Scenic
 15 River, an aquatic preserve, a water body designated in a plan
 16 adopted pursuant to s. 373.456 of the Surface Water
 17 Improvement and Management Act, or a nationally designated
 18 estuarine preserve;

19 3. Will provide for the long-term viability of
 20 endangered or threatened species or species of special
 21 concern; and

22 4. Is consistent with the objectives of a regional
 23 management plan adopted or endorsed by the department or water
 24 management districts.

25 (b) Once a mitigation bank service area has been
 26 established by the department or a water management district
 27 for a mitigation bank, such service area shall be accepted by
 28 all water management districts, local governments, and the
 29 department.

30 (c) If the requirements in s. 373.4135(1)(b) are met,
 31 the following projects or activities regulated under this part

1 shall be eligible to use a mitigation bank, notwithstanding
 2 the fact that they are not completely located within the
 3 mitigation service area.

4 1. Projects with adverse impacts partially located
 5 within the mitigation service area.

6 2. Linear projects, such as roadways, transmission
 7 lines, distribution lines, pipelines, or railways.

8 3. Projects with total adverse impacts of less than
 9 one acre in size.

10 (7) ACCOUNTING.--The department or the water
 11 management district shall provide for the accounting of the
 12 award, release, and use of mitigation credits from a
 13 mitigation bank.

14 (8) AUTHORITY OF LOCAL GOVERNMENTS.--Local governments
 15 may not require permits or otherwise impose regulations
 16 governing the operation of a mitigation bank. However, this
 17 section shall not be construed to limit the authority of a
 18 local government to require an applicant for a mitigation bank
 19 to obtain any authorization required by a local ordinance for
 20 the construction activities associated with a mitigation bank.

21 (9) PRIOR APPLICATIONS.--An application for a
 22 mitigation bank conceptual approval or mitigation bank permit
 23 which is pending with, and determined complete by, the
 24 department or a water management district on or before the
 25 effective date of this act, or a mitigation bank conceptual
 26 approval or mitigation bank permit issued on or before the
 27 effective date of this act, shall continue to be subject to
 28 the rules adopted pursuant to s. 373.4135 which were in effect
 29 on the effective date of this act, unless the applicant or
 30 permittee elects to be subject to the rules governing
 31 mitigation banks adopted after that date.

1 (10) MODIFICATION WITH RESPECT TO PRIOR
 2 APPLICATIONS.--Any application for a modification of a
 3 mitigation bank conceptual approval or mitigation bank permit
 4 which was pending with, and determined complete by, the
 5 department or water management district on or before the
 6 effective date of this act, shall continue to be subject to
 7 the rules adopted pursuant to s. 373.4135 in effect on the
 8 effective date of this act, unless the permittee elects to be
 9 subject to the rules governing mitigation banks adopted after
 10 that date. Any modification to a mitigation bank conceptual
 11 approval or mitigation bank permit issued on or before the
 12 effective date of this act, which is applied for within 20
 13 years of the effective date of this act, and which does not
 14 involve the addition of new land that was not previously
 15 included in the mitigation bank conceptual approval or
 16 mitigation bank permit, shall be subject to the rules adopted
 17 pursuant to s. 373.4135 which were in effect before the
 18 effective date of this act, unless the permittee elects to be
 19 subject to the rules governing mitigation banks adopted after
 20 that date.

21 (11) RULES.--The department and water management
 22 district may adopt rules to implement the provisions of s.
 23 373.4135 and s. 373.4136, which shall include, but not be
 24 limited to, provisions:

25 (a) Requiring financial responsibility for the
 26 construction, operation, and long-term management of a
 27 mitigation bank;

28 (b) For the perpetual protection and management of
 29 mitigation banks; and

30 (c) Establishing a system and methodology for the
 31 valuation, assessment, and award of mitigation credits.

1 Section 8. This act shall take effect upon becoming a
2 law.
3 Section 9. This act shall take effect July 1, 1996.
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